

The Honorable Barbara J. Rothstein

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON,

Plaintiff,

v.

BETSY DeVOS, in her official capacity as
Secretary of the United States Department of
Education; and the UNITED STATES
DEPARTMENT OF EDUCATION, a federal
agency,

Defendants.

NO. 2:20-cv-01119-BJR

STATE OF WASHINGTON'S
RESPONSE TO DEFENDANTS'
MOTION FOR EXTENSION OF
TIME

I. INTRODUCTION

Defendants have failed to demonstrate good cause to extend their deadline to respond to the motion for preliminary injunction. In setting the briefing schedule and hearing, the Court correctly recognized the immediate harms facing the State of Washington, its school administrators, and its students caused by the U.S. Department of Education's (the Department) interim final rule. Washington timely served its motion on the U.S. Attorney's Office. The Court should either deny Defendants' motion or allow such extension to keep the August 4 hearing date so that this urgent matter may be promptly adjudicated.

II. FACTS

The State of Washington filed its Complaint for Declaratory and Injunctive Relief on July 20, 2020, challenging the Department of Education's interim final rule (Rule) relating to

1 CARES Act funds for public elementary and secondary schools. Dkt. 1. In the Civil Cover Sheet,
 2 Washington made clear that it would soon file a motion for preliminary injunction: “preliminary
 3 injunction to be sought promptly.” Dkt. 1 at p. 33. Three days later, Washington filed its 24-page
 4 motion for preliminary injunction,¹ seeking to enjoin Defendants from implementing or
 5 enforcing the Department’s Rule. Dkt. 8 at pp. 8-13. The motion and supporting declarations set
 6 forth in detail the real concerns and difficult decisions the Washington Office of Superintendent
 7 of Public Instruction (OSPI), the local school districts, and Washington families face in light of
 8 the Rule, particularly during a global pandemic. *Id.* These immediate concerns include having
 9 adequate funds for public schools to address safety and health concerns, ensuring access to
 10 education *within a few weeks* for public school students who have insufficient technology for
 11 remote teaching, and even providing access to meal programs. *See e.g.* Dkt. 9 at pp. 5-6; Dkt. 10
 12 at pp. 5-6, 9-14; Dkt. 11 at pp. 5-6.

13 When Washington filed the motion for preliminary injunction, the case was assigned to
 14 Magistrate Judge Michelle Peterson. Dkt. 8. Washington noted the motion for the first available
 15 date under the fourth-Friday provision in Local Civil Rule 7(d)(3) for August 14. Dkt. 8.

16 No attorney representing the Defendants had appeared in the case, so Washington
 17 arranged for same-day hand-delivery of the papers to the U.S. Attorney’s Office in Seattle and
 18 over-night delivery to the Department to ensure that the likely assigned attorney of the
 19 Defendants had notice of the motion. Crisalli Decl. ¶ 4. Washington’s attorney checked the U.S.
 20 Attorney’s website, which stated that it was open for business until 5:00 p.m., and that reception
 21 would accept phone calls to arrange for service. Crisalli Decl. ¶ 5. Counsel also looked through
 22 a docket of a similar challenge to the Rule in California’s Northern District Court for possible
 23 individuals to provide a courtesy email service of the motion, and found no appearance on behalf
 24 of any of the Defendants. Crisalli Decl. ¶ 4. *See State of Michigan, et al. v. DeVos*, No. 20-4478-

25 ¹Defendants claim the motion is 35 pages (Dkt. 18 at pp. 3-4), apparently counting the caption, table of
 26 contents, table of authorities, and signature lines—all of which “need not be included within the page limit” by
 Local Civil Rule 6(e)(6).

1 JD (N.D. Cal. 2020); *see also* *NAACP, et al. v. DeVos*, 20-1996-DLF (D.D.C. 2020). Counsel's
 2 legal assistant worked with AGO general services staff members to confirm service of the motion
 3 occurred on the U.S. Attorney's Office. Crisalli Decl. ¶ 5. The legal assistant contacted the U.S.
 4 Attorney's office at 4:30 p.m. to alert them that the papers would be delivered. *Id.* Defendants
 5 agree that the motion was timely served at 4:33 p.m. on July 23, 2020. Dkt. 18 at p. 2.

6 After the motion filing, the Clerk entered an order reassigning the case to this Court. Dkt.
 7 14. The following day, the Court entered its standing order for all civil cases. Dkt. 15. After that,
 8 the Court entered a minute order setting a hearing on the motion for August 4 at 10:00 a.m., and
 9 set a deadline of July 30 for Defendants to respond to the motion. Dkt. 16.

10 On July 27, an Assistant U.S. Attorney contacted Washington and agreed that the
 11 Defendants had been served on July 23, but asked Washington to agree to a motion to extend
 12 Defendants' deadline to August 13, two weeks from the Court's deadline. Crisalli Decl. Ex. 1.
 13 Washington's counsel responded that it could not consent to an extension to August 13 because
 14 of the extreme time pressures faced by OSPI and school districts. *Id.* Washington agreed that
 15 given the circumstances causing closure of the U.S. Attorney's Seattle office for a day, it would
 16 consent to an extension of the response to August 3, at 10:00 a.m., which is 24 hours before the
 17 scheduled oral argument. *Id.* Defendants then appeared through counsel (Dkt. 17) and now bring
 18 this motion. Dkt. 18.

19 **III. ARGUMENT**

20 In setting the briefing and hearing schedule, the Court rightly recognized that the motion
 21 for preliminary injunction needed to be heard and decided promptly. Defendants have not shown
 22 good cause for any extension, let alone the one they seek. The Court should either deny
 23 Defendants' motion or grant only such relief as to keep the present hearing date.

24 Washington's motion was timely served on a day the U.S. Attorney's Office was open.
 25 As Defendants had not appeared until the filing of this motion, Washington had no opposing
 26 counsel for the United States to discuss scheduling, let alone effect efficient service. As a result,

1 Washington had to hand-deliver the motion and supporting papers to the U.S. Attorney's office
 2 on the date of filing. As Defendants admit, Washington served those papers at 4:33 p.m. on
 3 July 23, which is timely under the Federal Civil Rules of Procedure, the Local Civil Rules, and
 4 relevant case law. *See e.g., Trend Micro Inc. v. RPost Holdings, Inc.*, No. 13-cv-05227-WHO,
 5 2014 WL 1365491 (N.D. Cal. Apr. 7, 2014) (service of summons and complaint at 8:23 p.m.
 6 deemed timely); *Sang Mook Lee v. Cal. Inst. of Tech.*, No. CV08-5790 CAS (MANX), 2009 WL
 7 10674984 n.2 (C.D. Cal. July 14, 2009) (service of motion at 5:04 by email considered
 8 sufficient). Indeed, service was completed within the published office hours between 8:00 a.m.
 9 and 5:00 p.m. of the U.S. Attorney's Office the day before that office's closure.
 10 <https://www.justice.gov/usao-wdwa/contact-us> (last visited July 28, 2020). While the closure
 11 of the office is understandable, it occurred after timely service of the motion and supporting
 12 papers.

13 Washington's motion and supporting materials show that it is suffering immediate harm,
 14 contrary to Defendants' misstatement. *Contra* Dkt. 18 at p. 4; Dkt. at pp. 8-13. OSPI, the school
 15 districts, and Washington families are trying to make decisions about what will happen in a
 16 matter of weeks, when schools try to return to classes, at least in some form, during the middle
 17 of a global pandemic. A prompt hearing and determination on the motion for preliminary
 18 injunction will provide needed guidance for those difficult decisions.

19 Finally, Defendants have had ample time to develop a coherent rationale for the Rule, as
 20 the Rule is accompanied with a summary and extensive commentary. Defendants claimed to
 21 have enough justification to promulgate and declare effective immediately the interim final rule,
 22 and any *post hoc* justifications for the Rule are improper in any event.

23 Defendants have not demonstrated good cause for the relief they seek. Washington does
 24 not oppose an extension to account for the time Defendants' counsel could not work in their
 25 offices. As Washington proposed to Defendants, at most, the Court should grant an extension to
 26

1 10:00 a.m. on Monday, August 3, 2020, for Defendants to file their response. This would give
2 Defendants relief for the three days their offices were closed.

3 **IV. CONCLUSION**

4 The Court should deny Defendants' motion as they failed to demonstrate good cause.

5 DATED this 28th day of July 2020.

6 ROBERT W. FERGUSON
7 Attorney General

8 /s/ Paul M. Crisalli

9 PAUL M. CRISALLI, WSBA No. 40681
10 SPENCER W. COATES, WSBA No. 49683
11 JEFFREY T. SPRUNG, WSBA No. 23607
12 R. JULY SIMPSON, WSBA No. 45869
13 Assistant Attorneys General
14 paul.crisalli@atg.wa.gov
15 spencer.coates@atg.wa.gov
16 jeff.sprung@atg.wa.gov
17 july.simpson@atg.wa.gov
18 Attorneys for Plaintiff State of Washington
19
20
21
22
23
24
25
26